

No. 82-6973

NO. A-921

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

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SUPREME COURT, U.S.

TYRONNE LINDSEY,

Petitioner

VS.

STATE OF LOUISIANA

Respondent

PETITION FOR WRIT OF CERTIORARI TO
SUPREME COURT
OF THE STATE OF LOUISIANA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

- I. Whether the Supreme Court of the State of Louisiana failed to apply the correct federal constitutional standard in failing to undertake a statewide proportionality review to determine if the death penalty was proportionate to the crime for which it was imposed.
- II. Whether the Supreme Court of the State of Louisiana failed to apply the correct federal constitutional standard when it chose not to consider whether the death sentence was imposed by invalid statutory circumstances found by the jury.
- III. Whether the Louisiana statutory provisions for the imposition of the death penalty fails to meet federal constitutional standards.

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SUMMARY OF ARGUMENT

I. The State of Louisiana has created a limited district wide proportionality review of capital sentences. This review process militates against the due process requirements established in Gregg and Jurek v. Texas.

II. The aggravating circumstances which were returned by the sentencing jury were unconstitutional, or not supported by the evidence.

III. The Supreme Court of Louisiana has consistently refused to vacate a death sentence where the jury relied on invalid aggravating circumstances, so long as the jury also returned a valid aggravating circumstance. As one can only speculate as to whether TYRONNE LINDSEY'S sentence was not affected by an unconstitutional circumstance, his sentence must be set aside.

1.

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PETITION FOR WRIT OF CERTIORARI TO
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TYRONNE LINDSEY, petitioner herein prays that a writ of certiorari issue to review the judgment entered in this criminal case on February 23, 1983 and application for rehearing denied on March 25, 1983. Title 28 United States Code, Section 1257(3) confers jurisdiction on this Court to review the judgment in question by a writ of certiorari.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or

limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Eighth Amendment to the United States Constitution provides in pertinent part:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of the law; not deny to any person within its jurisdiction the equal protection of the law.

STATEMENT OF THE CASE

TYRONNE LINDSEY was indicted by the Grand Jury for the Parish of Jefferson, State of Louisiana on February 15, 1980 for the crime of first degree murder, a violation of La.R.S. 14:30. On July 15, 1980 the trial jury returned a verdict of guilty as charged and recommended the death penalty.

The facts as adduced at trial indicated that on December 19, 1979 one EARLINE B. KIDNER was approached by an armed robber in the parking lot of a shopping center. During a struggle for her purse the victim was shot once in the left flank area with a .22 caliber handgun. The victim died in the hospital the following day. (see transcript of trial on merits 7/14/80 pp.210-211 and coroner's day record introduced into original record). The assailant was pursued by two bystanders who discontinued the chase when the assailant pointed the pistol in their direction.

On September 8, 1981 the Supreme Court of Louisiana affirmed defendant's conviction but vacated his sentence and remanded for a new sentencing hearing. The resentencing hearing as conducted on February 8,9 and 10, 1982 and the jury recommended the imposition of the death penalty. The aggravating circumstances found at the resentencing hearing were:

- (a) the offender was engaged in the perpetration of armed robbery or simple robbery
- (b) the offender has a significant prior history of criminal activity
- (c) the offender knowingly created a risk of death or great bodily harm to more than one person.

The sentence was appealed to the Supreme Court of Louisiana which affirmed the sentence on February 23, 1983. The Supreme Court of Louisiana reviewed only one of the aggravating circumstances, relating to the perpetration of the armed robbery. The application for rehearing was denied on March 25, 1983.

ARGUMENT

I.

The Supreme Court Of The State Of Louisiana Failed To Apply The Correct Federal Constitutional Standard Of Review By Not Undertaking A Statewide Proportionality Review Of Cases To Determine The Validity Of The Imposition Of The Death Penalty.

The Louisiana first degree murder statute was formulated and adopted by the Louisiana legislature following several United States Supreme Court decisions which approved of proportionality review of death sentences. Gregg v. Georgia, 428 U.S. at 198, 203, 96 S.Ct. at 1936, 2929 (plurality opinion); Proffitt v. Florida, 428 U.S. at 259, 96 S.Ct. at 2969. Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950. The proportionality review is intended to prevent the arbitrary and capricious application of the death penalty. Greg v. Georgia, supra at 203, 96 S.Ct. at 2939. see Harris v. Pulley, 692 F.2d 1189 (9th Cir., 1983) Certiorari Granted, 203 S.Ct. 1425.

The Louisiana State Constitution of 1974 provided for a judicial review of excessive sentences. Apparently influenced by United States Supreme Court decisions relating to proportionality review of death sentence, Louisiana has adopted both by statute and rule a framework for such review, The Louisiana Code of Criminal Procedure Article 905.9 enjoins the Supreme Court of Louisiana to "review every sentence of death to determine if it is excessive" and directs the Court to "establish such procedures as are necessary to satisfy constitutional criteria for review."

The Supreme Court of the State of Louisiana has responded to the necessity of a proportionality review in their Court Rule 28, 1(c) which provides:

Review Guidelines. Every sentence of death shall be reviewed by this court to determine if it is excessive. In determining whether the sentence is excessive the court shall determine:

- (c) Whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

The Louisiana frame-work for review of death sentences is very similar to the statute reviewed by this Court in Gregg v. Georgia, supra, In State v. Sonnier, 379 So.2d 1336 (La.1979) The Supreme Court of Louisiana recognized that, "This is the same procedure for review authorized by Georgia statute approved by the United States Supreme Court in Gregg v. Georgia ." However, the Louisiana review process has deviated in a significant way from the forms of proportionality review approved by the United States Supreme Court.

In Jurek v. Texas, 428 U.S. at 276, 96S.Ct. at 2958 (emphasis supplied) this Court recognized the validity of the Texas scheme by noting: "By providing prompt judicial review of the jury's decision in a court with state-wide jurisdiction, Texas has provided a means to promote the evenhanded, rational, and consistent imposition of death sentences under law." In Gregg v. Georgia this Court described how a valid system operated:

"In performing its sentence-review function, the Georgia court has held that 'if the death penalty is only rarely imposed for an act or its is substantially out of line with sentences imposed for other acts it will be set aside as excessive.' Coley v. State, 231 Ga. (829), at 834, 204 S.E.2d (612), at 616. The court on another occasion stated that 'we view it to be our duty under the similarity standard to assure that no death sentence is affirmed unless in similar cases throughout the state the death penalty has been imposed generally . . . ' Moore v. State, 233 Ga. 861, 864, 213 S.E.2d 829, 832 (1975). See also

Jarrell v. State, *supra*, 234 Ga. (410) at 425, 216 So.E.2d (258), at 270 (standard is whether 'juries generally throughout the state have imposed the death penalty'); Smith v. State, 236 Ga. 12, 24, 222 S.E.2d 308, 318 (1976) (found a 'clear pattern' of jury behavior).

"It is apparent that the Supreme Court of Georgia has taken its review responsibilities seriously. In Coley, it held that 'the prior cases indicate that the past practice among juries faced with similar factual situations and like aggravating circumstances has been to impose only the sentence of life imprisonment for the offense of rape, rather than death.' 231 Ga., at 835, 204 S.E.2d, at 617. It there-upon reduced Coley's sentence from death to life imprisonment. Similarly, although armed robbery is a capital offense under Georgia law, 26-1902 (1972), the Georgia court concluded that the death sentences imposed in this case for that crime were 'unusual in that they are rarely imposed for (armed robbery). Thus, under the test provided by statute, . . . they must be considered to be excessive or disproportionate to the penalties imposed in similar cases.' 233 Ga., at 127, 210 S.E.2d, at 667. The court therefore vacated Gregg's death sentences for armed robbery and has followed a similar course in every other armed robbery death penalty case to come before it. . .

The provision for appellate review in the Georgia capital-sentencing system serves as a check against the random or arbitrary imposition of the death penalty. In particular, the proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury. If a time comes when juries generally do not impose the death sentence in a certain kind of murder case, the appellate review procedures assure that no defendant convicted under such circumstances will suffer a sentence of death." Gregg v. Georgia, 428 U.S. at 204-206, 96 S.Ct. at 2950.

The Supreme Court of the State of Louisiana has not adopted a consistent method of proportionality review for capital cases. The proportionality review in appellant TYRONNE LINDSEY'S case was conducted by comparing this case with cases within the 24th Judicial District rather than

on a state-wide basis. It has apparently been the policy of the Supreme Court of the State of Louisiana to conduct proportionality review only on the basis of comparison to similar cases within a particular judicial district. However, that court has deviated from the limited district-wide proportionality review to occasionally conduct state-wide review in capital cases. see State v. Narcisse, -So.2d-1983 (No.81-KA-2285); State v. Moore, -So.2d-1983 (No.82-KA-1709).

It is submitted that the State of Louisiana has failed to follow the due process requirements in death sentences as set out by this Court in Gregg v. Georgia and Jurek v. Texas. The failure of the Supreme Court of Louisiana to adopt a consistent state-wide method of proportionality review has created an arbitrary death penalty appeal process, in violation of the Fifth and Fourteenth Amendments to the United States Constitution. This Court has recently granted certiorari to review the validity of the California death sentence review process. Harris v. Pulley, 692F.2d 1189

(9th Cir., 1983) Certiorari Granted, 103 S.Ct.1425. The Louisiana death sentence review process has failed to comply with the constitutional requirements of due process necessary to prevent the arbitrary and capricious application of the penalty.

II.

The Louisiana Statutory Provisions For The Imposition
Of The Death Penalty Fails To Meet Federal Constitutional
Standards.

At the conclusion of the second sentencing hearing, the jury recommended a death sentence and found that of the aggravating circumstances listed in La.C.Cr.P.Art.905.4:¹

(A) the defendant was engaged in the perpetration of armed robbery or simple robbery; (B) the defendant has a significant prior history of criminal activity; (C) the defendant knowingly created a risk of death or great bodily harm to more than one person (R.676-677). Each of these statutory aggravating circumstances is invalid. The Louisiana Supreme Court failed to comply with federal due process requirements in their review of the jury findings.

(1) La.C.Cr.P.Art.

The following shall be considered aggravating circumstances:

- (a) the offender was engaged in the perpetration or attempted perpetration of aggravated rape, aggravated kidnapping, aggravated burglary, aggravated arson, aggravated escape, armed robbery, or simple robbery.
- (b) the victim was a fireman or peace officer engaged in his lawful duties;
- (c) the offender was previously convicted of an unrelated murder, aggravated rape, or aggravated kidnapping or has a significant prior history of criminal activity;
- (d) the offender knowingly created a risk of death or great bodily harm to more than one person;
- (e) the offender offered or has been offered or has given or received anything of value for the commission of the offense;
- (f) the offender at the time of the commission of the offense was imprisoned after sentence for the commission of an unrelated forcible felony;
- (g) the offense was committed in an especially heinous, atrocious, or cruel manner; or
- (h) the victim was a witness in a prosecution against the defendant, gave material assistance to the state in any investigation or prosecution of the defendant, or was an eye witness to a crime alleged to have been committed by the defendant or possessed other material evidence against the defendant.
- (i) the victim was a correctional officer or any employee of the Louisiana Department of Corrections who, in the normal course of his employment was required to come in close contact with persons incarcerated in a state prison facility, and the victim was engaged in his lawful duties at the time of the offense.

For the purposes of Subparagraph (b) herein, the term peace officer is defined to include any constable, marshal, deputy marshal, sheriff, deputy sheriff, local or state policeman,

AGGRAVATING CIRCUMSTANCESNO. 1. The Appellant Was Engaged In The Perpetration Of Armed or Simple Robbery.

At the guilt phase of the trial, Tyronne Lindsey was found guilty of first degree murder in violation of La. R.S. 14:30² (R.p.186) In reaching this determination, the jury must have necessarily found that the appellant had the specific intent to kill or inflict great bodily harm while engaged in the commission of an armed robbery. In the case at bar, the jury found as one of the aggravating circumstances that the murder was committed during the commission of an armed robbery or simple robbery(R.676). Counsel contends that it is improper to allow the jury to consider, as an aggravating circumstance, the underlying felony that the jury found to support a first degree murder conviction during the trial phase.

Z. La.-R.S. 14:30. First degree murder:

First degree murder is the killing of a human being:

(1) When the offender has specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated escape, aggravated arson, aggravated rape, aggravated burglary, armed robbery, or simple robbery;

(2) When the offender has a specific intent to kill or to inflict great bodily harm upon a firearm or peace officer engaged in the performance of his lawful duties;

(3) When the offender has a specific intent to kill or to inflict great bodily harm upon more than one person; or

(4) When the offender has specific intent to kill or inflict great bodily harm and has offered, has been offered, has given, or has received anything of value for the killing.

For the purposes of Paragraph (2), herein, the term peace officer is defined to include any constable, marshal, deputy marshal, sheriff, deputy sheriff, local or state policeman, game warden, federal law enforcement officer, jail or prison guard, parole officer, probation officer, judge, attorney general, assistant attorney general, attorney general's investigator, district attorney, assistant district attorney, or district attorney's investigator.

Whoever commits the crime of first degree murder shall be punished by death or life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence in accordance with the recommendation of the jury.

This situation is not per se a violation of the double jeopardy clause. However, it is counsel's contention that the use of a felony to support a first degree murder conviction and to justify an aggravating circumstance presents an analogous problem in a death case. Essentially, once the underlying felony has been used to obtain a conviction of first degree murder, it has become an element of that crime; therefore, it should not be used thereafter as the basis for an additional prosecution or sentence. CF. State ex rel Wikberg v. Henderson, 292 So.2d 505 (La.1974). See also, State ex rel Smith v. Phelps, 345 So.2d 446, 449 (La.1977).

This conclusion is especially compelling in the context of a death case. In order to meet contemporary constitutional standards, "(a) capital sentencing scheme must . . . provide a 'meaningful basis for distinguishing the few cases in which (the death penalty) is imposed from the many cases in which it is not.'" Godfrey v. Georgia, *supra*, 100 So.Ct.1759, 1964 (1980) (plurality opinion). To achieve this goal, the jury's "discretion (to impose the death penalty) must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action,." Gregg v. Georgia, 428 U.S. 153, 189 (1976) (plurality opinion).

However, where the felony-murder serves to make the defendant death-eligible by virtue of a conviction of first degree murder and to authorize the jury to return the death penalty, without any additional findings (La.C.Cr.P. Art.905.3), the jury is licensed in its unbridled discretion to single-weight or double-weight an identical aspect of the defendant's conduct. Defendants convicted of first degree murder under La.R.S. 14:30(1) would thus start out with one aggravating circumstance against them based upon a single and inseparable

feature of their crimes. Such a mechanistic application of an aggravating circumstance would deflect the jury from its relevant inquiry: what distinguishes this particular defendant convicted of robbery murder from other defendants guilty of capital crimes. In order to comply with pertinent federal constitutional dictates, the felony-murder aggravating circumstances must characterize a different and important element to a first degree murder conviction. That aggravating circumstance should not merely allow a jury to convert that guilt verdict into an automatic license to impose a death sentence. CF. State v. Cherry, 257 S.E.2d 551, 557, (N.C.1979), cert. den. 100 S.Ct.2165 (1980).

Viewed in this perspective, it is clear that the first aggravating circumstance was improperly found by the jury in the case at bar. When appellant entered the sentencing phase, he already had one strike against him, since the jury had found a statutory aggravating circumstance by virtue of the first degree murder conviction. This serves to eliminate in the minds of the jury, a major function during sentencing -- the independent finding of aggravating factors to authorize a death sentence. As a result, the jury's critical responsibilities at sentencing were diminished by its unlimited discretion to find an "automatic" aggravating circumstance. The jury's role at sentencing is not merely to repeat the guilty verdict in the form of an aggravating circumstance.

In sum, at the sentencing phase, it is essential that the jury focus on whether there are particular circumstances of the offense, in addition to the first degree murder conviction, that support a death sentence. Godfrey v. Georgia, supra, 100 S.Ct. at 1764. Instead, in the present case, the jury was allowed to return an aggravating circumstance already found as an essential aspect of the first degree

murder conviction. Thus, the jury was allowed to determine the defendant's guilt based on an identical factor that it subsequently employed to justify a death sentence. The discretion granted the jury does not comport with the requirements of Furman v. Georgia, 408 U.S. 238 (1972).

Therefore, this Court should bar instructions on the underlying felony aggravating circumstance at the sentencing phase once the jury has returned a guilt verdict based on that felony. Such a rule would ensure that the jury's discretion has been properly exercised and that the death sentence was not imposed under the arbitrary influence of an "automatic" aggravating circumstance.

AGGRAVATING CIRCUMSTANCE

NO. 2. The Offender Has A Significant Prior History of Criminal Activity.

La.C.Cr.P. Art.905.4(c), provides that the jury may find as an aggravating circumstance that:

"The offender was previously convicted of an unrelated murder, aggravated rape or aggravated kidnapping or has a significant prior history of criminal activity." In accordance with this provision the jury found as one of the aggravating circumstances that Tyronne Lindsey had a "significant prior history of criminal activity." (R.676).

Appellant acknowledges that the specifically listed violent crimes in La.C.Cr.P.Art. 905.4(c) have a rational relationship in determining the propriety of imposing the death sentence. However, the provision that allows a finding that a defendant has "...a significant prior history of criminal activity..." is unconstitutional because the provision is unconstitutionally vague on its face; and consequently, fails to adequately channel and focus capital sentencing discretion. In short, the provision violates the Eighth and Fourteenth Amendments as construed in Furman v. Georgia, 408 U.S.238(1972),

A. The Statutory Language "Significant Prior History of Criminal Activity" is Unconstitutionally Vague.

Due process forbids the imposition of sanctions under any procedure that "licenses the jury to create its own standard in each case," Herndon v. Lowry, 301 U.S. 242, 263 (1937) "and is susceptible of sweeping and improper application." N.A.A.C.P. v. Batton, 371 U.S. 415, 433 (1963). See also Giacco v. Pennsylvania, 382 U.S. 299 (1966); Thornhill v. Alabama, 310 U.S. 88, 97 (1970).

The due process doctrine of vagueness is firmly established and encompasses principles of fair notice, or warning, and definitive guidelines for law enforcement officials, judges and juries to follow in the application of their respective duties. This Honorable Court has stated:

"Vague laws offend several important values. First...we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly."...Second, if arbitrary and discriminating enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." Grayned v. City of Rockford, 92 S.Ct. 2294 (1972).

The possibility of an arbitrary application of a statute is of paramount concern in capital cases. The law "calls for a greater degree of reliability when the sentence of death is imposed." Lockett v. Ohio, 438 U.S. 586 (1978); also see Furman v. Georgia, supra.

Louisiana's death penalty statute is modeled after that of Georgia's. State v. Sonnier, 379 So.2d 1336, (La.1980). (on rehearing). Therefore, the interpretation of analogous provisions in the Georgia statute should be accorded considerable weight in assessing the Louisiana death sentencing scheme.

In Georgia, one of the statutory aggravating circumstances was virtually identical to the provisions in La.Cr.P. Art. 905.4(c): this provision allowed the jury to return a death sentence by finding the following:

"The offense of murder...was committed by a person...who has a substantial history of serious assaultive criminal convictions. "Ga.Code Ann. 27-2534.1(b)(1) (Emphasis added).

In Arnold v. State, 224 S.E.2d 386(Ga.1976), a case cited with approval in Gregg, supra, the Georgia Supreme Court held that the term "substantial history in the statute was unconstitutionally vague. Id at 391-392. The Court principally relied on Grayned v. City of Rockford, 408 U.S. 104(1971) and concluded that the "void for vagueness" doctrine expounded upon in Grayned "has particular application to death penalty statutes after Furman v. Georgia..."Arnold v. State, supra at 391-392. The Georgia Supreme Court then emphasized the need for a death penalty statute that carefully guides the jury's discretion in capital cases. "Whenever a statute leaves too much room for personal whim and subjective decision-making without a readily ascertainable standard or minimal, objective guidelines for its application, it cannot withstand constitutional scrutiny." Id. at 391. This view is consistent with Louisiana's view that "vague and overbroad" terms in a capital sentencing statute must be construed in a limited fashion in order to "avoid their arbitrary and discretionary application in the imposition of the death penalty." State v. English, 367 So.2d 815,823 (La.1979).

Viewed in this perspective, the words "significant prior history of criminal activity" in La.Cr.P.Art. 905.4(c) are as vague as the "substantial history" language condemned in Arnold v. State, supra. Both statutory terms fall squarely within the Due Process condemnation of penal laws "so vague

that men of common intelligence must necessarily guess at (their) ... meaning and differ as to (their) ... application." Connally v. General Construction Co., 269 U.S. 385,391(1926); Zwickler v. Koota, 389 U.S. 241,249(1967). For example, whether something is "significant" is a highly subjective judgment that could vary greatly from one juror to another. "Significant" could mean any number of kind of charges or convictions - juvenile, misdemeanor, or felony. Just what is meant by "prior history of criminal activity" is equally unclear. These words could include a defendant's juvenile record, misdemeanor and felony convictions, or merely crimes alleged to have been committed by the individual.

In the instant case, neither the statutory language nor the jury instructions offered any guidance for application of the vague language in the statute. Consequently, the second aggravating circumstance found by the jury in appellant's case is invalid.

B. The Statute Which Provides As An Aggravating Circumstance "Significant Prior History Of Criminal Activity" Fails to Adequately Channel And Focus Capital Sentencing Juries' Discretion.

During the course of the sentencing hearing, the State introduced as "criminal activity" two convictions, one of simple burglary³ and another of battery. (R.517). The prosecution also presented evidence that appellant had "abused drugs for a number of years." (R.546). The prosecution then elicited testimony that appellant "had a long history of antisocial violent behavior" which began when he "struck another child with a railroad iron..." (R.546). When the jury returned a finding of "significant prior history of criminal activity" it is not clear which crime or crimes

3. Appellant received a full pardon from the State of Louisiana for the conviction of simple burglary.

the jury relied upon to come to this conclusion. However, the jury may have, at least, relied in part on "crimes" which Tyronne Lindsey had neither been charged with nor those for which he was convicted. This provides an independent basis that the jury's discretion was far from properly channeled or focused.

In State v. McCormick, 397 N.E.2d 276 (Ind.1979), the Supreme Court of Indiana held that a jury cannot find, as an aggravating circumstance, a murder for which the defendant had not yet been convicted. To do otherwise would deny the defendant his rights under the Eighth and Fourteenth Amendments, in a capital case; because the jury would be presented at sentencing with inflammatory and prejudicial evidence of other acts that lacked the indicia of reliability of a criminal conviction. As the Court recognized in McCormick:

"We may assume that a conviction was obtained in a constitutionally proper manner. Proof of a conviction therefore carries with it the assurance that the facts underlying that conviction have already been fully established to an untainted, unbiased jury in a forum in which the full protections of the Constitution were afforded to the defendant. Thus, we do not foresee a risk that evidence of a prior conviction or of a life sentence will cause the death penalty to be recommended and imposed in an arbitrary and capricious manner." Id at 281. (Emphasis in original)

In contrast, when the state bases its presentation on non-convictions, "the actual evidence of the crime will be presented for the first time to the sentencing jury. The facts regarding this alleged aggravating crime will never have been presented to an impartial, untainted jury, and the risk that the previously tainted jury will react in an arbitrary manner is infinitely greater." Id.

The concerns voiced in McCormick are obvious in the present case. The prosecutor encouraged the jury to find, as an aggravating circumstance, that the appellant had a

"significant prior history of criminal activity." The jury's finding may have been based on crimes which had never been processed through any judicial proceeding. Thus, there is a considerable possibility that the jury was significantly influenced in reaching its death verdict by evidence of unrelated criminal conduct that had not resulted in a criminal conviction; this very well might have caused "the death penalty to be recommended and imposed in an arbitrary and capricious manner." State v. McCormick, supra, 397 N.E.2d at 281.

In any event, the language "significant prior criminal activity is constitutionally infirm. The fact that this unconstitutionally vague formulation is used by the statute to define an aggravating circumstance makes the vagueness of paramount importance. Other defendants may be spared, while this defendant is condemned, solely on the basis of the distinction between their criminal records and his, made pursuant to the statutory phrase. Since the phrase provides no "meaningful basis for distinguishing the ... cases in which (a death sentence) is imposed from ... the many cases in which it is not," Lockett v. Ohio, 438 U.S. 586, 601 (1978), the appellant's death sentence is unconstitutionally arbitrary and cannot stand.

The Supreme Court of Louisiana chose not to review the validity of this aggravating circumstance.

AGGRAVATING CIRCUMSTANCE

NO. 3. The Knowingly Created A Risk Of Death Or Great Bodily Harm To More Than One Person.

The jury, at the sentencing phase of appellant's trial, returned the aggravating circumstance that the "offender knowingly created a risk of death or great bodily harm to more than one person." (R.676). The evidence in the case

In State v. Culberth, 390 So.2d 847 (La.1980), the Louisiana Supreme Court considered the application of this aggravating circumstance where the defendant did not injure or kill anyone other than the victim. He did, however, threaten another person with a weapon in hand, and tell the person that he would be "next." Id at 850. This threat was not pursued when the defendant had the opportunity to do so. The Court held that, in the circumstances of that case, there was insufficient evidence of a "single and consecutive course of conduct (that) contemplates and causes a great risk to more than one person," Culberth, id at 850. See also, State v. English, 367 So.2d 815 (La.1979).

The present case presents a comparable situation. The appellant did not injure or kill anyone wother than Ms. Kidner. While Tyronne Lindsey may have pointed a weapon at others, but Tyronne did not take any further steps to injure anyone. (R. 414,429). Unlike the defendant in Culberth, Tyronne made no verbal threats. Furthermore, as in Culberth, Tyronne did not attack anyone after the incident. The evidence, even when viewed in a light most favorable to the prosecution does not suggest that he intended to kill anyone other than Ms. Kidner. The present case is therefore, similar to the Louisiana Supreme Court decision in Culberth, for both cases involved little more than the brandishing of weapons. It follows that the third aggravating circumstance found by the jury is not supported by the record.

The failure of the Supreme Court of Louisiana to follow a consistent jurisprudential pattern in review of this aggravating circumstance serves to deny appellant his due process rights. In the present case the Supreme Court of Louisiana did not review this aggravating circumstance to determine if it was invalid or if the jury's consideration of the aggravating circumstance was erroneous.

III.

The Supreme Court Of The State Of Louisiana Failed To Apply The Correct Federal Constitutional Standard When It Chose Not To Consider Whether The Death Sentence Was Imposed By Invalid Statutory Circumstances Found By The Jury.

The Supreme Court of Louisiana has consistently refused to vacate a death sentence where the sentencing jury relied on an invalid aggravating circumstance, as long as the jury also relied upon another valid aggravating circumstance in imposing the death penalty. State v. Narcisse, No. 81-KA-2285 (La. Jan. 10, 1983); State v. Moore, 414 So.2d 340 (La. 1982); State v. Williams, 383 So.2d 369 (La. 1980), cert. den., 449 U.S. 1103; State v. Martin, 376 So.2d 300 *La. 1979), cert. den., 449 U.S. 998. Accordingly, the Supreme Court of Louisiana ruled, in the instant case, that, "Since the jury found one statutory aggravating circumstance (La. CodeCrim.P. Art. 905.5(a)) and that circumstance is clearly supported by the record, we find it unnecessary to decide whether the jury erred in finding two additional aggravating circumstances." State v. Lindsey, No. 82-KA-1323 at 7-8 (La. Feb. 23, 1983). Counsel contends that this practice of the Supreme Court of Louisiana ravages the very basis upon which the constitutional imposition of the death penalty rests.

In 1972 this Court held that the death penalty laws in Georgia constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. Furman v. Georgia, 408 U.S. 238 (1972). In arriving at this conclusion this Court recognized that, "The high service rendered by the cruel and unusual punishment clause" of the Eighth Amendment is to require legislatures to write penal laws that are evenhanded, nonselective, and nonarbitrary, and to require judges to see to it that general laws are not applied sparsely, relatively,

and spottily to unpopular groups." Furman; supra at 256. As the death penalty laws, at the time of Furman, could not assure non arbitrary evenhanded application, the death penalty statutes were unconstitutional under the Eighth and Fourteenth Amendments.

Several years after Furman this Court considered the constitutionality of another Georgia death penalty statute which was enacted shortly after Furman. Gregg v. Georgia, 428 U.S. 153(1976). This Court ruled that a carefully drafted statute which properly guided jury's deliberation, could ensure that the death penalty was not imposed in an arbitrary or capricious manner. Gregg, id. at 195.

In deciding that Georgia's statute satisfied this criteria this Court expressed the importance of aggravating and mitigating circumstances in properly guiding the jury's deliberations.:

"While such standards are by necessity somewhat general, (aggravating & mitigating circumstances) do provide guidance to the sentencing authority and thereby reduce the likelihood that it will impose a sentence that fairly can be called capricious or arbitrary. Where the sentencing authority is required to specify the factors it relied upon in reaching its decision, the further safeguard of meaningful appellate review is available to ensure that death sentences are not imposed capriciously or in a freakish manner." Gregg v. Georgia 408 U.S. at 194,195.

Later this Court again emphasized that the consideration of the mitigating and aggravating circumstances is a "constitutionally indispensable part of the process of inflicting the penalty of death." Woodson v. North Carolina, 428 U.S. 180,304. (1976) This conclusion was based on the qualitative difference between the penalty of death and the penalty of imprisonment and that "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson, supra at 305.

The Louisiana sentencing scheme focuses on the circumstances of the offense and the character and propensities of the defendant. La.C.Cr.P.Art. 905.2. In order to impose

However, the jury must also consider the pertinent mitigating circumstances before imposing the death penalty. State v. Clark, 387 So.2d 1124(La.1980). In short, this scheme is essentially molded after the Georgia provisions in Gregg v. Georgia. See State v. Clark, supra, at 1133. Like the Georgia statute, the Louisiana capital sentencing provisions substantially rely on the codified aggravating circumstances to support its constitutionality. State v. Clark, supra, at 1133. Also see Gregg v. Georgia, supra, at 206.

To hold, as does the Supreme Court of Louisiana that the death penalty is constitutional as long as the jury relied, in part, on valid aggravating circumstances, is anathema to this Court's decision in Goodfrey v. Georgia, 446U.S.420 (1980). In Godfrey this Court ruled that the discretion of a capital sentencing jury must be guided by "'clear and objective standards' that provide specific detailed guidance and that make rationally reviewable the process for imposing a sentence of death." Godfrey v. Georgia, supra at 423 (Footnote omitted). This constitutional requirement has not been met when a jury receives instructions upon an impermissible statutory aggravating circumstance and proceeds to return a sentencing verdict based in part upon such an impermissible factor.

In the instant case the jury found and returned at least one invalid aggravating circumstance in imposing the death penalty on Tyronne Lindsey.* As the record does not reflect the circumstance or circumstances which influenced the jury, one can only speculate whether "the (sentence) in this case was not decisively affected by an unconstitutional statutory circumstance." Stephens v. Zant, 631 F.2d 397,406

* See Argument II of this brief.

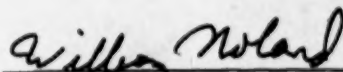
(5th Circ.1980), modified, 648 F.2d 446 (5th Circ.1981), cert. grtd. ____ U.S. ____ certified to Supreme Court of Georgia, ____ U.S. ____, 102 S.Ct. 1856(1982). To engage in such speculation portends that the jury's sentencing process is not rationally reviewable. See Godfrey v. Georgia, 446 U.S. 420 (1980).

Furthermore, this Court has consistently refused to indulge in speculating whether a jury "would have reached the same conclusion in the absence of an unconstitutional instruction." Zant v. Stephens, ____ U.S. ____, 102 S.Ct.1855, 1862 (1982) (Marshall, J. Dissenting); Bachellar v. Maryland, 397 U.S. 564, 570-571 (1970); Stromberg v. California, 283 U.S. 359 (1931); Bufford v. State, 382 So.2d 1162 (Ala.Cr.App.1980). Thus as the sentencing jury was instructed to consider several aggravating circumstances, where at least one of which proved to be unconstitutional, and the reviewing court is unable to determine from the record whether the jury relied on the unconstitutional circumstance, the sentence must be set aside. See Stephens v. Zant, supra at 406; Bufford v. State, 382So.2d 1162 (Ala.Cr.App.1980).

In sum, the record is not rationally reviewable, to ensure that the sentencing jury's discretion was properly guided by valid, constitutionally-indispensable aggravating circumstances. The policy of the Supreme Court of Louisiana in failing to review all aggravating circumstances serves to deny a capital defendant his right to proper judicial review. The Supreme Court of Louisiana has failed to provide a rationale for refusing to consider the effect of the jury's finding of invalid aggravating circumstances. Thus, the capital sentence review process in Louisiana fails to comply with proper constitutional requirements of review.

CONCLUSION

The State of Louisiana has failed to develop a constitutionally acceptable method of appellate review of capital cases. The Supreme Court of Louisiana does not conduct a consistent statewide proportionality review of cases where the death penalty has been imposed. Additionally, the Supreme Court of the State of Louisiana has decided not to review all of the aggravating circumstances returned by jury verdict in death cases. This inconsistent and arbitrary appellate review process denies due process of law to appellants in death cases in Louisiana. This Honorable Court should require the State of Louisiana to formulate and adopt a consistent and uniform method of proportionality review in capital cases. The Court should require a clarification of the policy of the Supreme Court of the State of Louisiana in failing to review all of the aggravating circumstances found by the jury. Moreover, the statutory scheme which allows an overlapping of the elements of capital murder in the elements of the aggravating circumstances must be corrected to require a constitutionally acceptable death sentence procedure.



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JUN 23 1983

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SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

TYRONNE LINDSEY,
Petitioner

VS.

STATE OF LOUISIANA,
Respondent

MOTION FOR LEAVE TO FILE WRIT
OF CERTIORARI IN FORMA PAUPERIS

Petitioner, TYRONNE LINDSEY, moves this Court for an order permitting him to file this Writ Of Certiorari for review of the judgment of the Supreme Court of Louisiana of February 23, 1983, Rehearing Denied March 25, 1983 in forma pauperis, pursuant to the provisions of Title 28 of the United States Code, Section 1915, and in support therefore attached the affidavit of petitioner.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1982

NO.

TYRONNE LINDSEY,
Petitioner

VERSUS

STATE OF LOUISIANA,
Respondents

AFFIDAVIT OF TYRONNE LINDSEY IN SUPPORT OF
MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, TYRONNE LINDSEY, being first duly sworn, depose and state that I am the petitioner in the above entitled case; that in support of my motion for leave to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the fees and costs of this proceeding or to give security therefor; and that I believe I am entitled to the redress sought in the petition for writ of certiorari. I am presently incarcerated under sentence of death in the custody of the Louisiana Department of Corrections.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting this petition are true.

1. Are you presently employed? No

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

None

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

Not applicable - Never Employed

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

No

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

Not applicable

3. Do you own any cash or checking or savings account?

No

a. If the answer is yes, state the total value of the items owned. Not Applicable

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Not Applicable

a. If the answer is yes, describe the property and state its approximate value. Not Applicable

5. List the persons who are dependent upon you for support and state your relationship to those persons. Not Applicable

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Tyrone Lindsey

SWORN TO AND SUBSCRIBED BEFORE ME, THIS 25th DAY OF

May, 1983.


LAWRENCE J. BOASSO
NOTARY PUBLIC

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* unpublished
Appendix

SUPREME COURT OF LOUISIANA

NO. 82-KA-1323

STATE OF LOUISIANA

v.

TYRONNE LINDSEY

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT,
PARISH OF JEFFERSON, STATE OF LOUISIANA
HONORABLE WALLACE C. LeBRUN, JUDGE

MARCUS, Justice

my
BHC
JW
HOP

Tyronne Lindsey was indicted by the grand jury for the first degree murder of Earline B. Kidner in violation of La. R.S. 14:30. After trial by jury, defendant was found guilty as charged. A sentencing hearing was conducted before the same jury that determined the issue of guilt. The jury unanimously recommended that a sentence of death be imposed on defendant. The trial judge sentenced defendant to death in accordance with the recommendation of the jury. Defendant appealed his conviction and sentence to this court. We affirmed defendant's conviction but vacated his sentence because of inappropriate comments by the state and the trial judge on the possibility of pardon and commutation. Defendant's case was remanded to the district court for the empanelling of a new jury for determining anew only the issue of penalty in accordance with the procedure set out in La. Code Crim. P. art. 905.1(B).

On remand, a new jury was selected. The evidence presented was practically the same as that adduced

D. James C. dissents w/ reasons
Dennis G. ...
...

at the original trial of the case. Additionally, defendant offered extensive evidence in mitigation. At the conclusion of the sentencing hearing, the jury unanimously recommended that a sentence of death be imposed on defendant. The trial judge sentenced defendant to death in accordance with that recommendation. In an assignment of errors filed in the district court, defendant designated seventeen errors to be urged on appeal. In brief to this court, defendant asserts eleven separate arguments covering many but not all of the assigned errors. Those errors not briefed were likewise not argued. In disposing of the matter, we followed the numerical order of the assignments of error designating opposite each the numbered argument(s) covering those assigned errors. Sixteen of the assignments of error including eight of the arguments do not present reversible error, nor do any involve legal issues not governed by clearly established principles of law. They will be treated in an appendix which will not be published but which will comprise part of the record in this case. We have treated those assignments which were neither briefed nor argued at the end of the appendix.

The remaining assignment of error (No. 17) covered by arguments (Nos. V, VII and IX) deals with the sentence review by this court.

FACTS

On the evening of December 19, 1979, at about 7:30, John Knopf and Steven Birks were returning to their car in the parking lot of the Oakwood Shopping Center in Jefferson Parish. They heard someone scream behind them and began walking toward the direction from which the

scream had come. Knopf hollered "Hey," and Birks, turning and looking toward his left, saw "a black man who had a white lady crouched down by the side of her car, passenger side." No other black men were in the vicinity. The man started running. Birks and Knopf, running down separate aisles of cars, pursued him. After about fifty yards, the man stopped in the well-lit area, turned, and aimed a .22 revolver at Knopf. Surprised to discover the man was armed, Knopf hesitated and then ducked behind a car. The man took off again and Birks continued the chase but never had an opportunity to observe his face and ultimately lost him.

Richard Alexander, a bystander in the vicinity, was about to get into his car when he heard screams and, looking in the direction from which they came, observed a struggle and then somebody running and pointing a gun at two people chasing him. When the man came within two car lengths (fifty feet), Alexander saw the man turn and point the gun at him. He noted both the man's face and that the gun was a .22 revolver.

Birks and Knopf returned to the area where they first observed the man only to find that his victim, Earline B. Kidner, age fifty-five, had been shot point blank. Mrs. Kidner was in town temporarily, visiting her son for three months around the Christmas holidays. She died in the hospital the day after the shooting.

Both Alexander and Knopf later identified defendant, from photographic lineups, as the man they had seen that night. Upon his arrest, defendant gave a taped statement to the police, admitting both his complicity in a

scheme to rob Mrs. Kidner of her purse and his flight from the area. But, defendant claimed that one of three friends with him, someone named "Sidney," shot Earline Kidner. Officer Beckendorf, who took the statement from defendant, testified that Joseph Smith, another of the friends defendant claimed was with him the night of the shooting, had accused defendant of the killing.

SENTENCE REVIEW

ASSIGNMENT OF ERROR NO. 17 (ARGUMENTS V, VII AND IX)

Defendant contends the trial judge erred in imposing an excessive sentence.

Article 1, section 20 of the Louisiana Constitution prohibits cruel, excessive, or unusual punishment. La. Code Crim. P. art. 905.9 provides that this court shall review every sentence of death to determine if it is excessive. The criteria for review are established in La. Sup. Ct. R. 28, §1, which provides:

Review Guidelines. Every sentence of death shall be reviewed by this court to determine if it is excessive. In determining whether the sentence is excessive the court shall determine:

(a) whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors, and

(b) whether the evidence supports the jury's finding of a statutory aggravating circumstance, and

(c) whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(a) Passion, prejudice or any other arbitrary factors

The defendant contends the death sentence was imposed under the influence of passion, prejudice or other arbitrary factors attributable to improper and inflammatory remarks made during the prosecutor's closing argument at the sentencing hearing. Defendant argues that the prosecutor's remarks greatly exceeded the evidence and "created a substantial risk that the jury's attention would be improperly shifted from its proper focus - the appropriate sentence to impose after an evaluation of the aggravating and mitigating factors - to the subject of the crime in general."

During closing argument, the prosecutor stated:

If a man in this society can go to a shopping center during any point of time, Christmas or whatever, and because he needs narcotics or because he doesn't care about the human effect, he doesn't care about people, can take a gun and stick it into a woman's back and shoot her and murder her, simply because of his own gratification, if a man can do this and not receive the ultimate penalty in law, well . . . that decision is in your hands.

The prosecutor had made almost identical comments during closing argument at defendant's original sentencing hearing. State v. Lindsey, 404 So. 2d 466, 482 (La. 1981). And, like the original hearing, defendant made no objection at the time but rather waited and raised it as an assignment of error on appeal.¹

1. Ordinarily, this court would find that the issue had not been preserved for review. La. Code Crim. P. art. 841. However, because this is a capital case and because this

Again, as on original hearing, we find defendant's contention to be without merit. The prosecutor's closing argument consisted of ten pages and four pages in rebuttal. He reminded the jury that defendant had already been found guilty of first degree murder. However, he emphasized that the state was nonetheless required to "prove beyond a reasonable doubt that at least one aggravating circumstance exists." He informed the jury that his "closing remarks are not evidence. It's merely what the attorneys appreciate the evidence to be in the matter." He then proceeded to review the evidence to show that defendant had committed a murder while engaged in the perpetration of an armed robbery, had knowingly created a risk of great bodily harm to more than one person and had a significant prior history of criminal activity. In rebuttal, the prosecutor responded to the arguments advanced by defense counsel in his closing argument. Again, he reminded the jury that its decision should not be "predicated on the argument of counsel" but rather "based on nothing more than the facts, the evidence, the circumstances that you heard during the course of this trial." It was in this context that the prosecutor made the above remarks. Considering the prosecutor's closing argument as a whole, we are unable to say that the remarks in question influenced, prejudiced or diverted the jurors from their sentencing obligations as

[continuation of footnote 1]

court has an obligation to examine the record for passion, prejudice or arbitrary factors which may have contributed to the death penalty recommendation, we will review the prosecutor's argument for possible reversible error. See La. Sup. Ct. R. 28, §1; State v. Berry, 391 So. 2d 406 (La. 1980) (on original hearing); State v. Sonnier, 379 So. 2d 1336 (La. 1980) (on rehearing).

correctly set forth in the trial judge's charge to them after completion of closing argument. Clearly, the remarks did not contribute to the jury's recommendation that defendant be sentenced to death.

Our review of the record reveals no evidence that passion, prejudice or any other arbitrary factors influenced the jury in its recommendation of the death sentence. Nor has any argument to that effect been raised by defendant other than the above which we have found to be without merit.²

(b) Statutory aggravating circumstances

The jury in its verdict found the following statutory aggravating circumstances:

- (a) the offender was engaged in the perpetration of armed robbery or simple robbery.
- (b) the offender has a significant prior history of criminal activity.
- (c) the offender knowingly created a risk of death or great bodily harm to more than one person.

Armed robbery is the theft of anything of value from the person of another or which is in the immediate control of another by use of force or intimidation, while armed with a dangerous weapon. La. R.S. 14:64. In our view, the evidence amply supports the jury's finding that defendant was engaged in the perpetration of an armed robbery.

Since the jury found one statutory aggravating circumstance (La. Code Crim. P. art. 905.4(a)) and that

2. Although the defendant is black and the victim white, defendant does not contend nor does the record indicate that the prosecutor made any appeal to racial prejudice in order to influence the jury in making its recommendation of the death sentence.

circumstance is clearly supported by the record, we find it unnecessary to decide whether the jury erred in finding two additional aggravating circumstances. Even if the jury erred the error is harmless. State v. Narcisse, No. 81-KA-2285 (La., Jan. 10, 1983); State v. Moore, 414 So. 2d 340 (La. 1982); State v. Mattheson, 407 So. 2d 1150 (La. 1981), rehearing denied; State v. Monroe, 397 So. 2d 1258 (La. 1981); State v. Williams, 383 So. 2d 369 (La. 1980), cert. denied, 449 U.S. 1103; State v. Martin, 376 So. 2d 300 (La. 1979), cert. denied, 449 U.S. 998.³

(c) Proportionality to the penalty imposed in similar cases

Supreme Court Rule 28, §4 provides that the district attorney shall file with this court a list of each first degree murder case in the district in which sentence was imposed after January 1, 1976. The list shall include the docket number, caption, crime convicted, sentence actually imposed and a synopsis of the facts in the record concerning the crime and the defendant.

In the instant case, the list reveals that there have been twenty-one first degree murder prosecutions in the Twenty-Fourth Judicial District Court in and for the Parish of Jefferson since January 1, 1976. Of these prosecutions, fifteen, including the instant case, resulted in

3. Zant v. Stephens, ____ U.S. ____, 102 S.Ct. 1856 (1982), does not represent a contrary holding. In Zant, the United States Supreme Court certified this issue to the Georgia Supreme Court for an explanation of the state-law premises supporting the court's conclusion that a death sentence was not impaired by the invalidity of one of the statutory aggravating circumstances found by the jury.

verdicts of first degree murder.⁴ Out of these fifteen, the death penalty was recommended by the jury in five cases, including the present case.⁵ In all five of these cases the defendants were the actual killers. In this case and two others, the killings occurred during armed robberies, a statutory aggravating circumstance.⁶ In the fourth and fifth death cases, there was either a risk of death or great bodily harm to more than one person or multiple aggravating circumstances.⁷

In the ten remaining first degree murder verdicts in Jefferson Parish, where a death sentence was

4. State v. Shilling, No. 82-KA-1820 (docketed but not yet set for argument); State v. Taylor, No. 81-KA-2298 (La., Nov. 18, 1982); State v. Sawyer, No. 81-KA-1566 (La., _____, 1982); State v. Sharp, No. 81-KA-2385 (La., July 2, 1982); State v. Lane, 414 So. 2d 1223 (La. 1982) (a companion to Sawyer); State v. Tuckson, 414 So. 2d 360 (La. 1982); State v. Love, 410 So. 2d 1045 (La. 1982); State v. Goza, 408 So. 2d 1349 (La. 1982); State v. Wilson and Moses, 404 So. 2d 968 (La. 1981); State v. Smith, 400 So. 2d 587 (La. 1981); State v. Berry, 391 So. 2d 406 (La. 1980); State v. Riggins, 388 So. 2d 1164 (La. 1980); State v. Manieri, 378 So. 2d 931 (La. 1979); State v. Andrews, 369 So. 2d 1049 (La. 1979).

5. The other four cases were Sawyer, supra; Smith, supra; Berry, supra; and Taylor, supra. Taylor and Smith were black on white crimes. Berry and Sawyer were white on white crimes.

6. The two cases involving armed robberies, in addition to the instant case, were Berry and Taylor, supra. In Berry, a police officer was killed during the course of an armed robbery. In Taylor, the defendant committed armed robbery in a shopping center parking lot at night. The victim had placed a car there with a For Sale sign. Defendant telephoned and expressed interest in the car. The victim was stabbed and shoved into the trunk of the car he had driven to the shopping mall.

7. The two other death cases were Sawyer and Smith, supra. In Sawyer, there were multiple aggravating circumstances. In Smith, there was a risk of death or great bodily harm to more than one person. The conviction was affirmed in Smith but the case was remanded to the trial judge for development of additional facts relating to the existence of the aggravating circumstance found by the jury.

not imposed, there was only one aggravating circumstance or a complete absence of such circumstances, or there were present mitigating circumstances which justified the jury's recommendation of life imprisonment.⁸

In an effort to counteract the aggravating circumstances argued by the state in the present case, defendant argued that there were three circumstances mitigating against a sentence of death:

(1) his youth (twenty years at the time of the offense). La. Code Crim. P. art. 905.5(f);

(2) that he was a principal whose participation was relatively minor. La. Code Crim. P. art. 905.5(g);

(3) that at the time of the crime, he was unable to appreciate the criminality of his conduct or to

8. State v. Lane, supra (Defendant was not the actual killer.); State v. Sharp, supra (Intoxicated Vietnam veteran killed wife's relatives when they tried to force him to leave their house in which his wife was staying since she decided to seek divorce.); State v. Goza, supra (Defendant was not the actual killer. The conviction and sentence were reversed and the case remanded for further proceedings.); State v. Andrews, supra (Defendant and victim were teenagers who had been arguing over football game.); State v. Manieri, supra (Defendants, two brothers ages 17 and 21, went to an acquaintance's house looking for marijuana; they killed eleven-year-old son of woman who asked them to leave her house.); State v. Love, supra (No aggravating circumstances established. The conviction and sentence were reversed and the case remanded for retrial.); State v. Tuckson, supra (On review, this court set aside the conviction and remanded the case for entry of guilty of second degree murder. Entry of unoccupied vehicle was not aggravated burglary.); State v. Wilson and Moses, supra (Defendants, both black, got into confrontation with a group of eighteen white males who were drinking beer in shopping center parking lot; defendants fired several shots, fatally wounding one person. The convictions and sentences were reversed and the case was remanded for a new trial.); State v. Riggins, supra (Defendant shot an elderly man who was in the process of closing up his business.); State v. Shilling, supra (Defendant and co-defendant stabbed and beat victim, took \$30 from his pants pocket, and later slit his throat and drowned him.).

conform his conduct to the requirements of the law because of mental disease or defect. La. Code Crim. P. art. 905.5(e).

Defendant called two psychiatrists, Dr. DeVillier and Dr. Arneson, as witnesses on the issue of mental defect. Both testified that defendant had an IQ between 50 and 60, representing mild to moderate mental retardation, but that he could distinguish right from wrong. Dr. Arneson found that defendant had a long history of antisocial behavior beginning around age eight when he struck another child with a railroad iron knocking his teeth out, as well as a history of drug abuse, and he described defendant as the type of person who would do anything for self-motivation or self-gratification regardless of the effect on others. Dr. Arneson further testified that defendant showed no remorse or display of sympathy in the present case and he considered defendant's chances of getting into this same kind of difficulty almost inevitable. Defendant also called as witnesses his minister, Reverend John L. Davis and two Catholic priests, Fathers George Lundy and Edward Arroyo, who had counseled him recently; but their testimony added little. No evidence was offered relative to the fact that defendant was a principal whose participation was relatively minor. To the contrary, the evidence is clear that defendant was the only person who committed the murder while engaged in the perpetration of the armed robbery. Defendant's youth, age twenty at the time of the offense, was a mitigating circumstance before the jury for its consideration.

Proportionality is a safeguard against arbitrary and capricious action by a jury. This court recently affirmed a sentence of death imposed for another armed robbery conviction in Jefferson Parish. State v. Taylor, supra. Although the present case does not involve the elements of heinousness present in Taylor, defendant did aim the murder weapon at several eyewitnesses and had a prior criminal record.⁹ We do not consider that defendant has demonstrated mitigating factors making the penalty imposed in this case arbitrary or capricious or disproportionate to that imposed in similar cases.

According to the Uniform Capital Sentence Report, defendant was a twenty year old black male at the time of the offense. He left school in his early teens and has worked only intermittently as a dishwasher and picking wood for his father. He has been evaluated as mildly to moderately retarded and has a long history of drug abuse. He has one child, illegitimate, to whom he has contributed some support. Defendant was arrested some two weeks after Earline B. Kidner's murder for carrying an illegal sawed-off shotgun. Three other subjects were arrested at the same time. One, Lester Thomas, gave a signed statement that defendant fled the scene of the shooting. Another, Michael Vincent, stated defendant spoke with him immediately after the shooting and admitted committing the

9. As stated earlier our decision makes it unnecessary for us to decide whether the jury erroneously concluded that these factors constituted statutory aggravating circumstances. They were in any event appropriate factors for the jury to consider.

murder. Defendant has a juvenile record and an adult record consisting of two prior misdemeanor convictions and one felony conviction.

After considering both the crime and the defendant, we are unable to conclude that the sentence of death in the instant case is disproportionate to the penalty imposed in similar cases in Jefferson Parish.

In sum, based on the above criteria, we do not consider that defendant's sentence of death constitutes cruel, excessive or unusual punishment.

DECREE

For the reasons assigned, defendant's sentence is affirmed.

(Editorial note to West Publishing Company: This appendix is not for publication.)

APPENDIX

ASSIGNMENT OF ERROR NO. 3 (ARGUMENT NO. 1)

Defendant contends the trial judge erred in denying his request for individual voir dire and sequestration of jurors. He argues that he was prejudiced as a result thereof.

A trial court has the discretion to permit individual voir dire if a defendant can demonstrate that special circumstances are present. State v. Lindsey, 404 So. 2d 466 (La. 1981); State v. Monroe, 397 So. 2d 1258 (La. 1981); State v. Robinson, 302 So. 2d 270 (La. 1974). No such showing was made here. Hence, there is no merit to this contention.

During voir dire, the trial judge called for a ten minute coffee break and instructed a deputy of the court to "take those people who have been selected as jurors." The judge reminded those jurors not to leave the group and "not to discuss this case with anybody until the case is over, not even your fellow jurors." "The rest of [the] people" were also instructed to take a short, ten-minute break. After the recess was over, defendant made the following objection:

[A]ll those who are in the audience and heard all the questions are going out not sequestered, when they come back and they're selected as jurors, they could influence the jurors who have been selected.

The objection was overruled. After the jury panel was selected, but prior to the selection of two alternates, the

trial judge reminded the panel "not to discuss this case with each other or with anyone else until the case is completely finished and a verdict has been rendered."

La. Code Crim. P. art. 791 provides in pertinent part:

A. A jury is sequestered by being kept together in the charge of an officer of the court so as to be secluded from outside communication, except as permitted by R.S. 18:1307.2.

B. In capital cases, after each juror is sworn he shall be sequestered.

This court has held that the purpose of art. 791 is to provide for keeping the jury together after selected and sworn, as well as secluded from outside communication. State v. Lindsey, *supra*; State v. McAllister, 253 La. 382, 218 So. 2d 305 (1969). We have held that it was not error in a capital case to have permitted already-sworn jurors to commingle with potential jurors during a fifteen-minute recess where the circumstances reasonably overcame any presumption of prejudice and affirmatively showed that no prejudice to the accused could have resulted. State v. Liner, 397 So. 2d 506 (La. 1981).

In the present case, even if the jurors not yet selected did commingle during the ten-minute recess with those already sworn, a fact not clear from the record, we consider that under the circumstances, in particular the judge's warning against discussing the case, defendant was not prejudiced.

Assignment of Error No. 3 is without merit.

ASSIGNMENT OF ERROR NO. 4 (ARGUMENT NO. IV)

Defendant contends the trial judge erred by not allowing him reasonable time to take writs after denial of several pretrial motions.¹ Defendant argues that he should have been granted his request for a ten-day continuance.

When defendant's pretrial motions were denied, after a hearing, and defendant requested ten days to file writs, the trial judge noted that it was already January 8 and trial was set for January 25. The judge refused to allow a ten-day continuance and ruled that if defendant wished to file writs he should do so by four o'clock that evening. Defendant objected arguing that he needed time to determine whether he should take writs. Defendant's appointed counsel assured the judge he was not attempting a delay tactic.

Rule 10, §5(b) of the Louisiana Supreme Court Rules provides, in pertinent part:

When an application is sought to review the actions of a trial judge, he shall fix a reasonable time within which the application shall be filed in this court, and he may in his discretion stay further proceedings. Upon proper showing, the judge or this court may by order extend the time for such filing. (Emphasis added.)

Under Rule 10, §5(b), once the trial judge refused to stay the proceedings, defendant's remedy was to

1. They were: A motion for "production of impeaching information and evidence"; a motion to allow both defense counsel to present opening and closing statements; a motion to allow defendant to act as co-counsel; a motion to allow retained counsel to enroll as co-counsel with appointed counsel; a motion for individual voir dire and sequestration of jurors; and a motion to have jurors complete a questionnaire before voir dire.

apply to this court for an extension of the 4:00 p.m., January 8 deadline which the trial judge had imposed. Defendant did not do so. Now, defendant raises this issue on appeal. Our review of the record shows that the trial judge gave reasons for his denial of each motion. We find no error in his rulings.

Assignment of Error No. 4 is without merit.

ASSIGNMENT OF ERROR NO. 7 (ARGUMENT NO. II)

Defendant contends the trial judge erred in denying his motion for a mistrial based on the court's denial of his challenge for cause of a juror already sworn who later came forward and said he had relatives in the Sheriff's Department. Defendant argues the juror's presence on the jury was prejudicial.

When he was initially examined, the juror, Mr. Puglise, stated that no member of his family was in law enforcement. Neither the state nor defendant exercised a challenge, peremptory or for cause, of Mr. Puglise and he was sworn.

Mr. Puglise later came forward, during voir dire, and informed the judge:

There's something I overlooked.
Two cousins that work here in the
courthouse . . . for the Sheriff's
Department. . . . I didn't think
about them.

When questioned by the judge, Mr. Puglise stated that his relationship to these Sheriff's Department employees made no difference to him and that he would not take a policeman's word over that of any other witness. The judge found that Mr. Puglise had "honestly forgot" about his relations and saw no reason to excuse him for cause. Defendant

objected and, having already exhausted his peremptory challenges, asserted a challenge for cause. The trial judge questioned Mr. Puglise further. The juror stated that he had not talked to his cousins in six months and had never discussed any court matter with them. Given these facts and the fact that Mr. Puglise had already said he could be a fair and impartial juror, the judge denied defendant's challenge for cause and also his subsequent motion for a mistrial.

Under La. Code Crim. P. art. 797(3), a challenge for cause may be made when:

The relationship, whether by blood, marriage, employment, friendship, or enmity between the juror and the defendant, the person injured by the offense, the district attorney, or defense counsel, is such that it is reasonable to conclude that it would influence the juror in arriving at a verdict.

The time for challenges is governed by La. Code Crim. P. art. 795 which provides that a juror cannot be challenged for cause after having been accepted unless the ground for the challenge was not known prior to acceptance. We have held that a trial judge is vested with broad discretion in ruling on a challenge for cause, and that ruling will not be disturbed on appeal absent a showing that he abused that discretion. State v. Allen, 380 So. 2d 28 (La. 1980).

In the instant case, the ground for a challenge for cause, that is, the juror's relationship by blood to two Sheriff's Department employees, was not known by defendant until after the juror was sworn. Therefore, under art. 795, defendant could still exercise a challenge

for cause. However, 797(3) provides that a juror's blood relationship to law enforcement employees is a ground for a challenge for cause where "it is reasonable to conclude that it would influence the juror in arriving at a verdict." In State v. Allen, supra, we held that one could not reasonably conclude such influence where jurors initially stated they would give more weight to the testimony of law enforcement officers, but later upon further inquiry "demonstrated their willingness and ability to decide the case impartially, according to the law and evidence." Here, as the trial judge noted, the juror stated he could be a fair and impartial juror. Unlike Allen, supra, he also stated he would not give greater weight to the testimony of policemen. The juror's failure to mention his relations in law enforcement when first questioned on voir dire is not surprising in view of his testimony that he had not talked to them in six months and had never discussed any court business with them. Under the circumstances, it would not have been reasonable to infer that Mr. Puglise's relationship by blood with two law enforcement employees would cause bias or prejudice to defendant. Hence, the trial judge did not abuse his discretion in denying defendant's challenge for cause.

Nor did the trial judge err in denying defendant's subsequent motion for a mistrial. The grounds for a mistrial are set forth in La. Code Crim. P. art. 775 which provides in pertinent part:

A mistrial may be ordered,
and in a jury case the jury dismissed, when:

. . . .

(6) False statements of a juror on voir dire prevent a fair trial.

Upon motion of a defendant, a mistrial shall be ordered, and in a jury case the jury dismissed, when prejudicial conduct in or outside the courtroom makes it impossible for the defendant to obtain a fair trial, . . .

The trial judge's denial of defendant's challenge for cause of Mr. Puglise did not make it impossible for defendant to obtain a fair trial; therefore, a mistrial was not warranted.

Assignment of Error No. 7 is without merit.

ASSIGNMENT OF ERROR NO. 13 (ARGUMENT NO. III)

Defendant contends the trial judge erred in allowing photocopies of a document³ already introduced in evidence to be made for use by the jurors.

Just before the end of its case, the state moved to introduce in evidence a certified copy of the coroner's report.⁴ While the jury was examining this and other exhibits, the state moved that "the report . . . be xeroxed and an individual copy provided to each individual on the jury [to] save time, instead of reading . . . [or] instead of having one review it for twenty minutes and passing it down for another twenty minutes. . . ." The trial judge granted the state's motion, commenting:

3. In brief, defendant contends that two other documents were also photocopied: a certified copy of defendant's 1977 conviction for simple burglary (S-10) and a certified copy of his 1977 conviction for battery (S-11). However, the record, although not explicit, indicates that only one document, "the report," was photocopied. At oral argument it was made clear that this was the coroner's report (S-8).

4. Included with the coroner's report were the victim's death certificate and the autopsy report.

I do not see in any way how it can prejudice the rights of the defendant, and, for the interest of saving time, I'm going to order that we photostat that which has been introduced into evidence. I'm going to request that counsel for the defendant both go and see that the photostats are exactly the same as that which was introduced, and I'm going to order that fourteen copies be made and give one copy to each juror to look at, because the first juror has taken twenty minutes before we broke. Multiply that by fourteen times and you'll have almost five hours--or at least four hours that the jury will be looking at the thing before they get finished.

Defendant objected. He argued that the judge was in essence emphasizing this particular piece of evidence to the jury and making a comment on the evidence in violation of La. Code Crim. P. art. 772. He further argued that since each copy was not certified, the photocopies were "no evidence at all" under La. R.S. 15:457. The judge reiterated that the jury would be given a copy of the coroner's report "in order to save time, as a convenience to the jury as well as a convenience to the court and everybody else." He instructed the jury that the photocopies were allowed for the sake of time only and were "in no way intended to give any special emphasis on this particular document."

La. R.S. 15:457 provides that "[a] copy of a document, certified to by the officer who is the legal custodian of the same is equivalent to the original in authenticity. . . ." In the instant case, the copy of the coroner's report submitted in evidence was certified by two assistant coroners and it was, therefore, equivalent to the original in authenticity.

La. Code Crim. P. art. 17 provides that a court "has the duty to require that criminal proceedings shall be conducted with dignity and in an orderly and expeditious manner and to so control the proceedings that justice is done." Under La. Code Crim. P. art. 3, "Where no procedure is specifically prescribed by this Code or by statute, the court may proceed in a manner consistent with the spirit of the provisions of this Code and other applicable statutory and constitutional provisions." One restriction which the Code places on the court is La. Code Crim. P. art. 772 which provides:

The judge in the presence of the jury shall not comment upon the facts of the case, either by commenting upon or recapitulating the evidence, repeating the testimony of any witness, or giving an opinion as to what has been proved, not proved, or refuted.

In the instant case, the trial judge granted the state's motion to have the coroner's report photocopied for each juror in order to expedite the proceedings. This was consistent with the mandate of art. 3 to expedite the proceedings. No procedure is specifically prescribed by Code or statute for such a situation. We consider that the judge proceeded in a manner consistent with the spirit of the Code as mandated by arts. 17 and 772. The judge made it clear that this procedure was not to be taken as a comment on the evidence. The photocopies were properly submitted for the jury's use.

Assignment of Error No. 13 is without merit.

ASSIGNMENT OF ERROR NO. 14
(ARGUMENTS NOS. VI, VIII, X AND XI)

By this assignment of error, defendant contends the trial judge erred in denying his motion for a mistrial based on his argument that the judge's reply to the jury's request for clarification on the role of mitigating circumstances was not responsive to the question asked. In brief, defendant further argues the trial judge erred in his initial jury instructions on aggravating and mitigating circumstances and burden of proof.

The record shows that the trial judge instructed the jury to consider both aggravating and mitigating circumstances, and he enumerated for them those circumstances listed in La. Code Crim. P. arts. 905.4 and 905.5 and told them that they would be furnished a list of both for use during deliberation. He reminded the jury:

. . . Before you decide that a sentence of death should be imposed, you must unanimously find beyond a reasonable doubt that at least one statutory aggravating circumstance existed. . . . You are not to be influenced by passion, prejudice, or any other arbitrary factor. Even if you unanimously find one or more statutory aggravating circumstances, you are not required to impose the death penalty on Tyronne Lindsey. . . . You can still sentence [him] to life imprisonment. . . . Even if you find the existence of the aggravating circumstance, you must also consider any mitigating circumstances before you decide that a sentence of death should be imposed. . . . [I]n addition to those specifically provided mitigating circumstances, you may also consider any other relevant mitigating circumstance. . . which you feel should mitigate the severity of the penalty to be imposed. In considering possible mitigating circumstances, you are

not limited to those which may have existed at or prior to the offense; you may also consider facts and circumstances that have occurred since the time of the offense. A mitigating circumstance does not have to be proved beyond a reasonable doubt to exist. The fact that you are given a list of aggravating and mitigating circumstances should not cause you to infer that the Court believes that any of the circumstances do or do not exist. . . .

Later during its deliberations, the jury asked the judge "[I]f there is one or more mitigating circumstances, can the death penalty still be imposed?" The trial judge called both counsel to the bench. After neither counsel objected to his proposed instructions, he read to the jury La. Code Crim. P. art. 905.3 verbatim, interjecting only a notation that the statutory reference to mitigating circumstances was "in plural." The judge asked whether this answered the jury's question. The jury foreman replied that it "sure" did. After the jury returned to its deliberations, defendant objected to the trial judge's clarifying instruction. He then argued that the instruction was not responsive and that the proper instruction was: "[If] you find any mitigating circumstances, you have to come up with a verdict of life imprisonment and not death." The judge noted defendant's proposed instruction was "not the law" and overruled the objection. He pointed out that he had called defendant to the bench prior to giving the instruction to give him an opportunity to object and defendant had not done so.

La. Code Crim. P. art. 802 mandates that "[t]he court shall charge the jury: (1) as to the law

applicable to the case." Jury findings for recommending a sentence of death are governed by art. 905.3 which provides:

A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, recommends that the sentence of death be imposed. The jury shall be furnished with a copy of the statutory aggravating and mitigating circumstances.

Articles 905.4 and 905.5 provide lists of the aggravating and mitigating circumstances which "shall be considered."

In the instant case, the trial judge complied with the mandate of art. 802 that he instruct the jury "as to the law applicable to the case," here a capital case, when he instructed the jury on their duty, that is, the burden of proof, under La. Code Crim. P. art. 905.3 and enumerated the aggravating and mitigating circumstances which arts. 905.4 and 905.5 state "shall" be considered before a sentence of death is recommended. The trial judge's supplementary instruction was a reiteration of that law. Article 905.3, which the judge read to the jury, clearly sets forth the prerequisites for recommending a sentence of death, that is, that after finding one aggravating circumstance existed beyond a reasonable doubt, the jury has the option to recommend a sentence of death irrespective of whether or not they find mitigating circumstances were present provided they did fully consider the possibility of mitigating circumstances. Neither the state nor defendant objected to the trial judge's proposed reading of art. 905.3 in response to the jury's request for clarification. After the judge read art. 905.3, the jury

foreman stated without equivocation that their question had been answered. Hence, the judge properly denied defendant's motion for a mistrial.

Assignment of Error No. 14 is without merit.

OTHER ASSIGNMENTS OF ERROR

Assignments of error neither briefed nor argued are generally considered abandoned. State v. Lindsey, 404 So. 2d 466 (La. 1981). However, in cases where the death penalty is imposed this court reviews assignments of error not briefed as a matter of policy. State v. Lindsey, supra; State v. Monroe, 397 So. 2d 1258 (La. 1981).

In Assignment of Error No. 1, defendant contends the trial judge erred in denying his motion for production of "impeaching information and evidence." Defendant argued his motion should be granted to enable him to adequately prepare. La. Code Crim. P. arts. 716-729.6 govern discovery. The state complied with all the discovery requirements at the time of defendant's original trial. In the present case, the state made it clear that it would rely entirely on the record from defendant's original trial, of which defendant admitted he had a copy, and the state restricted itself to that record. The judge observed that it was impossible for the state to tell defendant what it intended to impeach until defendant's witnesses had been sworn and had testified. Assignment of Error No. 1 is without merit.

In Assignment of Error No. 2, defendant contends the trial judge erred in denying his motion to allow each of his counsel, appointed and retained, to make opening

and closing arguments. Defendant could cite no authority for his motion. The trial judge ruled that, while defendant had a right to co-counsel, he did not have a right to have both counsel make opening and closing arguments and that the time allotted for such arguments would not be prorated between the counsel absent some showing that they had different areas of expertise. This court has held that matters of practice and procedure are left to a trial judge's sound discretion, unless regulated by statute or established by jurisprudence⁵ and that courts have sufficient discretion to enable them to reasonably expedite the trial of cases.⁶ A conviction will not be set aside for error unless the defendant's rights were plainly violated. La. Code Crim. P. art. 921. They were not violated in this case. Hence, Assignment of Error No. 2 is without merit.

In Assignment of Error No. 5, defendant contends the trial judge erroneously allowed the state to present part of its opening statement on voir dire. The state began its voir dire with a short synopsis of the facts and procedural history of this case. Defendant objected. The state argued that its statement was directed at discovering those jurors who had preformulated opinions about the case. Defendant's objection was overruled. The state continued its voir dire, concluding with a short explanation that the jury's duty was not to determine defendant's guilt or innocence but to fairly and impartially determine his penalty. The purpose of voir dire is to

5. State v. Horn, 167 La. 190, 118 So. 884 (1929).

6. State v. Major, 132 La. 201, 61 So. 202 (1913).

determine qualifications of prospective jurors by testing their competency and impartiality. It is designed to discover bases for challenges for cause, one of which is that the juror is not impartial, and to secure information for an intelligent exercise of peremptory challenges. The scope of voir dire examination is within the sound discretion of the trial judge and his rulings will not be disturbed on appeal in the absence of a clear abuse of discretion. State v. Perry, 420 So. 2d 139 (La. 1982); State v. Murray, 375 So. 2d 80 (La. 1979); State v. Jackson, 358 So. 2d 1263 (La. 1978). The trial judge did not abuse his discretion when he allowed the state to set the factual framework of the case and then question the jurors on their prior knowledge thereof after clarifying that defendant's guilt was not at issue. Hence, Assignment of Error No. 5 is without merit.

In Assignment of Error No. 6, defendant contends it was error for the trial court to disallow his voir dire of a potential juror on mitigating circumstances. Defendant asked the juror if he would come back with a sentence of life imprisonment if he were convinced that there was a mitigating circumstance. The state objected. The trial court sustained the objection on the ground that the question was an incorrect statement of the law under La. Code Crim. P. art. 905.3. The trial judge correctly sustained the objection and required defendant to restate the law correctly if he wished to state the law at all. State v. James, 339 So. 2d 741 (La. 1976). Hence, Assignment of Error No. 6 lacks merit.

In Assignment of Error No. 8, defendant contends the trial judge erred by not tendering each juror for challenge individually. Jurors were voir dired and tendered for challenge in panels of ten. La. Code Crim. P. art. 786 provides for "the right to examine prospective jurors," and La. Code Crim. P. art. 788 provides that after such examination "a prospective juror" shall be tendered first to the state and then to defendant. La. Const. art. 1, §17 guarantees that "[t]he accused shall have a right to full voir dire examination of prospective jurors and to challenge jurors peremptorily." We do not consider that the collective tendering of a panel of ten prospective jurors for challenge deprives defendant of a meaningful exercise of his constitutional right to full voir dire.

In Assignment of Error No. 9, defendant contends the trial judge erred in admitting in evidence the victim's death certificate and the coroner's report, over his objection. The record shows that both documents bore the certificates of two assistant coroners. Under La. R.S. 15:457, "[A] copy of a document, certified to by the officer who is the legal custodian of the same is equivalent to the original in authenticity." La. Code Crim. P. art. 105 expressly provides that a coroner's report is admissible as competent evidence of death and cause thereof, but not of any other fact. The state had from the beginning stated its intent to rely upon what was in the record of the original trial. These documents had been accepted in evidence at that time. The trial judge correctly concluded that the documents were admissible in evidence for the present sentencing hearing. Hence, Assignment of Error No. 9 is without merit.

In Assignment of Error No. 10, defendant contends the trial judge erred in playing his taped confession over his objection. Defendant argued that the content of the tape was not relevant to the sentencing hearing. The state argued that it was relevant evidence because it established the fact of an armed robbery, one of the aggravating circumstances under La. Code Crim. P. art. 905.4. The trial judge overruled defendant's objection and noted that the confession was admissible in its entirety since it was part of the original record on which the state was entitled to rely. For the reasons cited by the state and the trial judge, we consider that Assignment of Error No. 10 is without merit.

In Assignment of Error No. 11, defendant contends the trial judge erred in admitting in evidence certified copies of two prior convictions. Defendant objected to the admission of S-10, a certified copy of his 1977 conviction for simple burglary, on the grounds that it was an incomplete record (governmental pardon not attached) and that it was too old to be relevant. He argued that S-11, a certified copy of his 1977 conviction for battery was also too old to be relevant. The state contended that both documents were relevant to its attempts to prove that defendant had a "significant prior history of criminal activity," an aggravating circumstance under La. Code Crim. P. art. 905.4. La. Code Crim. P. art. 905.2 provides in pertinent part that evidence of aggravating circumstances "shall be relevant" and that "[t]he jury may consider any evidence offered at the trial on the issue of guilt." We have held that a pardon does not prevent the use of a

conviction for purposes of impeachment. State v. Clark, 402 So. 2d 684 (La. 1981). The defendant may introduce evidence of his pardon and the jury may weigh it as a valid consideration in assessing his credibility. Similarly, we consider that in the instant case evidence of a pardon did not bar the court's admitting a prior conviction in evidence for purposes of showing an aggravating circumstance. Any pardon, as well as the remoteness of prior convictions, should have been addressed by defendant as a mitigating circumstance. Hence, Assignment of Error No. 11 is without merit.

In Assignment of Error No. 12, defendant contends the court erred in denying his motion for a directed verdict based upon the state's failure to present evidence proving beyond a reasonable doubt the existence of any aggravating circumstance or "any type of crime committed." We have held that a trial judge may only direct a verdict in bench trials, not in jury trials. State v. Garrison, 400 So. 2d 874 (La. 1981). Furthermore, La. Code Crim. P. art. 905.8 states that "[t]he court shall sentence the defendant in accordance with the recommendation of the jury." (Emphasis added.) State v. Prejean, 379 So. 2d 240, 246 (La. 1979). The trial court therefore had no authority or discretion to grant defendant's motion and correctly denied it. Hence, Assignment of Error No. 12 is without merit.

In Assignments of Error Nos. 15 and 16, defendant contends the trial judge erred in denying his motion for a new trial and in arrest of judgment based upon "any patent errors made throughout the course" of the

sentencing hearing, specifically that alleged in Assignment of Error No. 11. As we have noted on this appeal, none of defendant's assignments of error has merit. Likewise, our review of the record discloses no patent error. Hence, defendant's motions for a new trial and in arrest of judgment were properly denied. Assignments of Error Nos. 15 and 16 are without merit.

SUPREME COURT OF LOUISIANA

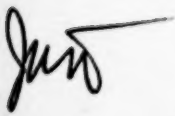
No. 82-KA-1323

STATE OF LOUISIANA

Versus

TYRONNE LINDSEY

DIXON, Chief Justice (dissenting)

 I respectfully dissent.

A constitutional death penalty is not available
for twenty year old black retarded unemployable drug
abusers like this defendant.

2

NO. 82-KA-1323

STATE OF LOUISIANA

versus

TYRONNE LINDSEY

LibraryDENNIS, J., concurring.

I respectfully concur.

The majority opinion states that any error committed by the jury in finding more than one aggravating circumstance is harmless. The statement is misleading because it indicates that this court has reviewed the record and found no reasonable possibility that such an error contributed to the verdict and was harmless beyond a reasonable doubt. See *State v. Gibson*, 391 So.2d 421 (1980). There has been no review for this purpose, however, because this court has taken the position that its judicial function is completed upon the finding of sufficient evidence to support one aggravating circumstance in a capital case. See, *State v. Monroe*, 397 So.2d 1258 (La. 1981); Cf. *State v. Moore*, 414 So.2d 340 (La. 1982); *State v. Williams*, 383 So.2d 369 (La. 1980); cert. denied, 449 U.S. 1103; *State v. Martin*, 376 So.2d 300 (La. 1979), cert. denied, 449 U.S. 998. See generally, Note, Capital Sentencing Review Under Supreme Court Rule 28, 42 La.L.Rev. 1100, 1110-112 (1982).

* * *

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ORIGINAL

No. 82 KA 1323

SUPREME COURT
OF THE
REHEARING
STATE OF LOUISIANA

DELIVERED BY HAND

SUPREME COURT OF LOUISIANA

FILED

MAR 8 1983

KDR

Clerk.

Ernest L. Lindsey
Clerk

STATE OF LOUISIANA

VERSUS

TYRONE LINDSEY

In Re TYRONE LINDSEY APPLYING FOR REHEARING

Applying for Certiorari, or writ of review, to the court of Appeal

Parish of _____ State of Louisiana.

Joseph L. Montgomery, Esq.

Martha E. Sassone, Esq.

INDIGENT DEFENDER BOARD

P. O. Box 9

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3/25/83

Attorneys for Applicant.

REHEARING DENIED

William J. Guste, Jr., Attorney General,
Barbara Rutledge, Asst. Attorney General,
John M. Mamoulides, District Attorney,
Steve Little, Philip Boudousque, Melvin Zeno,
and _____
Attorneys for Respondents.
William C. Credo, Asst. District Attorneys

[Signature]

Dixon, C.J. would grant

SUPREME COURT OF LOUISIANA
A TRUE COPY

[Signature]

Clerk